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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 224.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CHARLES LOUGHREY AND MILES H. WHEELER.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT.

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a [Transcript of record. In the United States circuit court of appeals for the seventh circuit. October term, A. D. 1893. No. 139. The United States of America vs. Charles Loughrey and Miles H. Wheeler. Mr. Thomas E. Milchrist, counsel for plaintiff in error; Mr. W. H. Webster, counsel for defendant in error. Error to the circuit court of the United States for the eastern district of Wisconsin. Transcript of record filed Oct. 6, 1893. Printed record. Department of Justice, June 22, 1896. Filed Nov. 9, 1893. Oliver T. Morton, clerk.]

b [In the circuit court of the United States for the eastern district of Wisconsin. The United States of America, plaintiff, vs. Charles Loughrey and Miles H. Wheeler, defendants. Mr. Elihu Colman, for plaintiff; Mr. W. H. Webster, for defendant.]

1 Circuit court of the United States for the eastern district of Wisconsin.

UNITED STATES OF AMERICA, *Eastern District of Wisconsin, ss:*

At a stated term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held according to law at the city of Milwaukee on the first Monday (being the second day) of January, A. D. 1893. Present, the Honorable James G. Jenkins, district judge, presiding.

Præcipe for summons, filed Aug. 30, 1890.

THE UNITED STATES OF AMERICA	} <i>At law.</i>
<i>vs.</i>	
CHARLES LOUGHREY AND MILES H. WHEELER.	

Be it remembered that heretofore, to wit, on the thirtieth day of August, A. D. 1890, came the U.S. district attorney, Mr. Elihu Colman, and filed his præcipe for a summons against the above-named defendants as follows:

Circuit court of the United States for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,	}
<i>vs.</i>	
CHARLES LOUGHREY AND MILES H. WHEELER, defendants.	

Issue a summons in the above-entitled case.	Complaint not served.
	ELIHU COLMAN,
	<i>Plaintiff's Attorney.</i>

To EDWARD KURTZ, Clerk.

2 *Summons.*

Circuit court of the United States for the eastern district of Wisconsin.

[L. S.]

THE UNITED STATES OF AMERICA, PLAINTIFF,	}
<i>vs.</i>	
CHARLES LOUGHREY AND MILES H. WHEELER, defendants.	

The President of the United States of America to the said Defendants:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-

entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint.

The marshal of said district is hereby commanded to serve this summons, and make due return thereto.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the eastern district of Wisconsin, this 30th day of August, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 115th.

EDWARD KURTZ, *Clerk.*

Return to summons.

ELIHU COLMAN,

U. S. District Attorney:

(P. O. address, Milwaukee, Wis.)

Served on the within-named Charles Loughrey, at Florence County, Wis., by showing him this summons and delivering to him personally a copy thereof, this first day of September, A. D. 1890.

Served on the within-named Miles H. Wheeler, at Neenah, Wis., by leaving a copy of this summons at his usual place of abode, in presence of a member of his family of suitable age and discretion, whom I informed of the contents thereof, he not being found, this 15th day of September, A. D. 1890.

G. N. WISWELL, *Marshal.*

By HENRY MARSHALL, *Deputy.*

3 September 16, 1890. This day came the district attorney and filed his complaint, as follows:

Complaint, filed Sept. 16, '90.

Circuit court of the United States, eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF, }

vs.

CHARLES LOUGHREY AND MILES H. WHEELER, }

defendants.

The plaintiff herein, the United States of America, by Elihu Colman, its attorney, for complaint in this action respectfully shows to the court and alleges upon information and belief:

That at the times hereinafter mentioned the plaintiff herein was the owner of the lands described as follows, to wit: The north half (N. $\frac{1}{2}$) of the northwest quarter (NW. $\frac{1}{4}$) and the northwest quarter (NW. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$) and the southeast quarter (SE. $\frac{1}{4}$) of section thirteen (13), township forty-four (44) north, of range thirty-five (35) west, in the State of Michigan, said lands forming a part of the public domain.

That during the winter of 1887 and 1888 one Joseph E. Sauve knowingly and wrongfully entered on the above mentioned and described lands, and there cut down and caused to be cut down six hundred thousand

(600,000) feet, board measure, of pine trees, without the knowledge or consent of this plaintiff.

That thereafter said Joseph E. Sauve transported and caused to be transported to the banks of Paint River eighty thousand (80,000) feet, board measure, of said timber, which thereupon was and became worth seven and 50-100 dollars (\$7.50) per thousand (1,000) feet, and that said Joseph E. Sauve skidded and caused to be skidded on the said land
4 where cut the balance of said timber, to wit, five hundred and twenty thousand (520,000) feet, board measure, which thereupon was and became worth six dollars (\$6.00) per thousand (1,000) feet.

That during said winter of 1887 and 1888 said Joseph E. Sauve sold to the defendants, Charles Loughrey and Miles H. Wheeler, all of said timber, to wit: The eighty thousand (80,000) feet at Paint River, and the five hundred and twenty thousand (520,000) feet on skids on said land, and that the defendants, Charles Loughrey and Miles H. Wheeler, thereupon during the winter of 1887 and 1888, and prior to the first day of March, 1888, wrongfully took possession of all of the aforesaid timber and converted the same to their own use to plaintiff's damage, in the sum of three thousand seven hundred and twenty dollars (\$3,720), with interest on said amount from March 1, 1888.

Wherefore, plaintiff demands judgment against the defendants for the sum of three thousand seven hundred and twenty dollars (\$3,720), with interest thereon from the first day of March, A. D. 1888, and with the costs and disbursements of this action.

ELIHU COLMAN,
Attorney for the United States of America, plaintiff.

EASTERN DISTRICT OF WISCONSIN, ss:

Elihu Colman, being duly sworn, says that he is the attorney and agent for the United States of America for the eastern district of Wisconsin. That he makes this verification for and on behalf of said plaintiff as such attorney and agent. That he has read the foregoing complaint and knows the contents thereof. That the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Subscribed and sworn to before me this 6th day of September, A. D. 1890.

ELIHU COLMAN,
WM. D. CONKLIN,
United States Commissioner, E. Dist. Wisconsin.

5 December 31, 1890. This day came the defendants, by their attorney, Mr. W. H. Webster, and filed their answer, as follows:

Answer, filed Dec. 31, 1890.

Circuit Court of the United States, eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF, }
vs. }
CHARLES LOUGHREY AND MILES H. WHEELER, }
defendants. }

The defendants answer the complaint herein as follows:

They admit that they purchased of Joseph E. Sauve, named in said

complaint, about the time therein stated, a quantity of timber in the log, not to exceed four hundred thousand (400,000) feet, board measure, or two thousand dollars in value, cut about the time stated in the complaint, upon the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of section thirteen (13) in township forty-four (44) N. of range thirty-five (35) W., in the State of Michigan, but upon no other lands, and subsequently sold and disposed of the same.

Further answering said complaint, the defendants allege upon information and belief that, except as hereinbefore stated, no allegation of said complaint is true.

They therefore demand judgment for the dismissal of the complaint herein, and for the costs and disbursements of this action.

W. H. WEBSTER,
Def't's Atty.

DEC. 31st, 1890.

STATE OF WISCONSIN, *County of Oconto, ss:*

W. H. Webster, being sworn, deposes and says he is one of the attorneys for the defendants in the foregoing entitled action, and makes this affidavit for and in behalf of said defendants, both of whom reside 6 out of, and neither of whom is now within, the county of Oconto, in said State, in which county deponent resides and now is, which is the reason deponent and neither of the defendants verifies this answer; that deponent drew the foregoing answer and knows the contents thereof. That the same is true of his own knowledge, except as to these matters therein stated on information and belief, and as to those matters he believes it to be true. That the grounds of his belief consist of statements made to him by the defendants with reference to the acts, matters, and things stated in the complaint herein and in the foregoing answer.

W. H. WEBSTER.

Subscribed and sworn to before me this 31st day of Dec., 1890.

F. F. WHEELER,
Circuit Court Commissioner in and for Oconto Co., Wis.

February 25, 1893. Stipulations of the parties in writing, waiving a jury, &c., filed, as follows:

Stipulation, waiving jury and agreement as to facts, filed Feb. 25, '93.

In circuit court of the United States, for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF, }
vs. }
CHARLES LOUGHREY AND MILES H. WHEELER, }
defendants. }

It is stipulated by and between the parties to this action that a jury is waived and the same be tried by the court without a jury.

It is further stipulated that, the facts having been ascertained to be as hereinafter stated, the court shall try the case upon such facts, which are hereby stipulated to be as follows:

First. The defendants, prior to the first day of March, 1888, cut and removed from the north half ($\frac{1}{2}$) of the northwest quarter (NW. $\frac{1}{4}$), and the northwest quarter (NW. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), and the southeast quarter (SE. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$) of section thirteen (13), in township forty-four (44) north, of range thirty-five (35) west, in the State of Michigan, four hundred thousand (400,000) feet of pine timber and converted the same to their own use.

Second. That such cutting and taking of said timber by the defendants from said land was not a willful trespass.

Third. That none of the lands in question were ever owned or held by any party as a homestead.

Fourth. That the value of said timber shall be fixed as follows: That the value of the same upon the land or stumpage, at \$2.50 per thousand, board measure; that the value of the same when cut and upon the land, \$3.00 per thousand, board measure; that the value of the same when placed in the river was \$5.00 per thousand, board measure; that the value of the same when manufactured was \$7.00 per thousand, board measure.

Fifth. That the lands above described were a part of the grant of lands made to the State of Michigan by an act of the Congress of the United States, approved June 3, 1856, being chapter 44 of Volume II of the United States Statutes at Large, and that said lands were accepted by the State of Michigan by an act of its legislature approved February 14th, 1857, being public act No. 126 of the laws of Michigan for that year, and were a part of the lands of said grant within the six-mile limit, so called, outside of the common limits, so called, certified and approved to said State by the Secretary of the Interior, to aid in the construction of the railroad mentioned in said act No. 126 of the laws of Michigan of 1857 to run from Ontonagon to the Wisconsin State line, therein denominated "The Ontonagon and State Line Railroad Company."

Dated October 14th, 1892.

ELIHU COLMAN,
Plaintiff's Attorney.

W. H. WEBSTER,
Defendants' Attorney.

8 *Second stipulation as to facts.*

In circuit court of the United States, eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF, }
vs. }
CHARLES LOUGHREY AND MILES H. WHEELER, }
DEFENDANTS. }

It is further stipulated—

First. That the lands in question were never earned by any railroad or other company under the act of Congress of June 3rd, 1856, United States Statutes at Large, Volume II, page 21.

Second. That the stipulation heretofore made shall be understood to cover only the facts therein agreed upon.

Third. That the history of the Ontonogan and State Line Railroad grant, marked "Exhibit A," may be used as evidence as far as applicable to this case.

ELIHU COLMAN,
Attorney for Plaintiff.

W. H. WEBSTER,
Attorney for Defendants.

9

Trial of case before the court.

And now, at this same term, to wit, January term, 1893, and on the fortieth day thereof, to wit, on the 25th day of February, A. D. 1893, the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA	} At law.
<i>vs.</i>	
CHARLES LOUGHREY & MILES H. WHEELER.	

This day came the parties by their counsel, Mr. Elihu Colman, district attorney, appearing for the plaintiff, and Mr. W. H. Webster for the defendants, and the issue herein came on to be tried before the court, pursuant to the agreement in writing of the parties, waiving a jury, herein filed. And said issue was thereupon tried by the court without a jury, and being argued by said counsel upon the pleadings and evidence, and submitted, the court took the same under consideration.

Judgment.

And afterwards, to wit, on the fifty-sixth day of said term, to wit, on the 16th day of March, A. D. 1893, the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA	} At law.
<i>vs.</i>	
CHARLES LOUGHREY & MILES H. WHEELER.	

This cause having been heretofore submitted upon the pleadings and evidence, on consideration thereof and of the arguments of counsel thereon, the court doth find the issue herein in favor of the defendants as per findings of fact and conclusions of law herein filed.

Whereupon it is considered and adjudged by this court now here that the United States of America, plaintiff, take nothing by their writ, and that the defendants go thereof acquit without day.

Judgment roll signed March 16th, A. D. 1893.

EDWARD KURTZ, *Clerk.*

10 Which findings of fact and conclusions of law are as follows, to wit:

Findings of facts and conclusions of law.

In circuit court of United States for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,	}
vs.	
CHARLES LOUGHREY AND MILES H. WHEELER.	
defendants.	

At the January term of said court, begun and held at the city of Milwaukee in said district January 2, 1893, Hon. James G. Jenkins, judge, presiding, this cause being at issue and upon the calendar for trial at said term of court, and the parties, by stipulation in writing filed herein, having waived a jury and stipulated that the case be tried by the court without a jury, and the same having been so tried, Elihu Colman, esq., United States district attorney for this district, appearing for the plaintiff, and W. H. Webster, esq., appearing for the defendants, the court now finds the facts to be as follows:

First. The defendants, prior to the 1st day of March, 1888, cut and removed from the north half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) and the northwest quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$) and the southeast quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$) of section thirteen (13) in township forty-four (44) north, of range thirty-five (35) west, in the State of Michigan, four hundred thousand (400,000) feet of pine timber, and converted the same to their own use.

Second. That such cutting and taking of said timber by the defendants from the said land was not a wilful trespass.

Third. That none of the lands in question were ever owned or held by any party as a homestead.

11 Fourth. That the value of said timber standing was \$2.50 per thousand feet, board measure, and the value of the same in the log upon the land where cut was \$3.00 per thousand feet, board measure, and in the log in the river \$5.00 per thousand feet, board measure, and manufactured into lumber \$7.00 per thousand feet, board measure.

Fifth. That the lands above described were, at the time of such cutting, removal, and conversion of said timber, a part of the grant of land made to the State of Michigan by an act of the Congress of the United States, approved June 3rd, 1856, being chapter 44 of Volume II of the United States Statutes at Large, and that said lands were accepted by the State of Michigan by an act of its legislature, approved February 14th, 1857, being public act No. 126 of the laws of Michigan for that year, and were a part of the lands of said grant within the six-mile limit, so called, outside of the common limits, so called, certified and approved to said State by the Secretary of the Interior, to aid in the construction of the railroad mentioned in said act, No. 126, of the laws of Michigan of 1857, to run from Ontonagon to the Wisconsin State line, and there denominated "The Ontonagon and State Line Railroad Company."

Sixth. That said railroad was never built, and said grant of lands was never earned by the construction of any railroad.

As conclusions of law the court finds:

First. That the cause of action sued on in this case did not, at the time of the commencement of this action, and does not now, belong to the United States of America.

Second. That the defendants are entitled to judgment herein for the dismissal of the complaint upon its merits.

Let judgment be entered accordingly.

By the court:

JAS. G. JENKINS, Judge.

12 June 10, 1893. This day came the district attorney, Mr. J. H. M. Wigman, and filed his exceptions to said findings, as follows:

Exceptions to findings, filed June 10, 1893.

Circuit court of the United States, eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF, }
 vs. }
 CHARLES LOUGHREY AND MILES H. WHEELER, }
 defendants. }

And now comes the plaintiff, by its attorney, and excepts to the finding of facts herein by the court and its conclusions of law thereon, as follows:

The plaintiff excepts to the conclusion of law herein by the court by which it finds that the cause of action sued in this case did not at the time of the commencement of this action, and does not now, belong to the United States of America.

The plaintiff excepts to the conclusion of law found by the court by which it finds that the defendants are entitled to judgment herein for the dismissal of the complaint upon its merits.

The plaintiff excepts to the order of the court herein made ordering that judgment be entered accordingly.

The plaintiff excepts to the failure of the court to find as facts herein that the "Ontonagon & State Line Railroad Company" had neglected and failed to complete its road within the time limited by law, that the lands described in the complaint remained unsold, and that the said lands reverted to the United States long before the commencement of this action.

13 The plaintiff excepts to the failure of the court to find that at the time of the cutting and removing of the timber by the defendant the lands on which said timber was cut, and described in the complaint, was and formed a part of the public domain.

The said plaintiff excepts to the failure of the court to find that at the time of the cutting and removing of said timber the United States was the owner of the said lands and timber. The plaintiff excepts to the failure of the court to find, as conclusion of law, that the plaintiff was entitled to judgment against the said defendants for the value of the timber cut and removed by the defendants from the lands described in the complaint, and converted by them to their own use.

The plaintiff excepts to the failure of the court to order judgment in favor of the plaintiff, and against the said defendants, for the value of the said timber cut and removed by said defendants from said lands and so converted by them to their own use.

The plaintiff excepts to the judgment herein by the court by which it adjudged that the plaintiff take nothing by their writ and that the defendants go thereof acquit without day.

J. H. M. WIGMAN,
U. S. Attorney for the East. Dist. of Wisc.

Allowance of writ of error.

September 6, 1893. This day came the district attorney, Mr. J. H. M. Wigman, and filed his assignment of errors, and upon his application it is ordered by the circuit judge that a writ of error be allowed, and that a transcript of record, with said writ of error, be forwarded to the United States circuit court of appeals for this circuit, at Chicago, Ill. Whereupon a writ of error and citation issued, returnable on the 6th day of October next, and a copy of said writ of error lodged for the defendants in error.

14 Which assignment of errors and prayer for a writ of error are as follows:

Assignment of errors.

Circuit court of the United States for the eastern district of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF	}
in error,	
vs.	
CHARLES LOUGHREY AND MILES H. WHEELER,	}
defendants in error.	

Afterwards, to wit, on the 6th day of September, in the year of our Lord one thousand eight hundred and ninety-three, comes the United States of America by J. H. M. Wigman, U. S. attorney for the eastern district of Wisconsin, its attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit, that the court of the United States for the eastern district of Wisconsin erred in finding as conclusion of law:

1st. That the cause of action sued in this case did not at the time of the commencement of this action, and does not now, belong to the United States of America.

2nd. That the said circuit court of the United States for the eastern district of Wisconsin erred in finding as conclusion of law that the defendants are entitled to judgment herein for the dismissal of the complaint upon its merits.

3rd. That the said circuit court of the United States for the eastern district of Wisconsin erred in ordering that judgment be entered accordingly.

4th. That the said circuit court of the United States for the eastern district of Wisconsin erred in failing to find as a fact herein
 15 that the Ontonagon & State Line Railroad Company had neglected and failed to complete its road within the time limited by law, and that the lands described in the complaint remained unsold, and that the said lands reverted to the United States long before the commencement of this action.

5th. That the said circuit court of the United States for the eastern district of Wisconsin erred in failing to find as a fact herein, that, at the time of the cutting and removing of the said timber by the defendants, the lands on which said timber was cut and described in the complaint was and formed a part of the public domain.

6th. The said circuit court of the United States for the eastern district of Wisconsin erred in failing to find that, at the time of the cutting and removing of the said timber, the plaintiff was the owner of the said lands and timber.

7th. The said circuit court of the United States for the eastern district of Wisconsin erred in failing to find as conclusions of law that the United States of America was entitled to judgment against the said defendants for the value of the timber cut and removed by said defendants from the lands described in the complaint and converted to their own use.

8th. That the said circuit court of the United States for the eastern district of Wisconsin erred in not ordering and decreeing judgment in favor of the said plaintiff and against the said defendants for the value of the said timber cut and removed by said defendants from said lands and so converted by them to their own use with costs.

Wherefore the United States of America prays that the judgment of the circuit court of the United States for the eastern district of Wisconsin be reversed, and the said circuit court of the United States for the eastern district of Wisconsin be ordered to enter an order directing judgment in favor of the United States of America and against the defendants, Charles Loughrey and Miles H. Wheeler, for the value of the timber cut and removed by them from the lands in the complaint described and by them converted to their own use with the costs of this action.

J. H. M. WIGMAN,

*U. S. Attorney for the East. District of Wisconsin,
 Green Bay, Wisconsin.*

16

Petition for writ of error, filed Sept. 6, '93.

United States of America, eastern district of Wisconsin.

To the Circuit Court of the United States for the Eastern District of Wisconsin:

And now comes the United States of America, by J. H. M. Wigman, its attorney, and complains that in the records and proceedings, and also in the rendition of judgment in a suit between The United States of America, plaintiff, and Charles Loughrey and Miles H. Wheeler, defendants, tried in the circuit court of the United States for said eastern district of Wisconsin, at the January term thereof, A. D. 1893, and in which judgment was rendered against said plaintiff by the dismissal of the complaint upon

its merits on the 16th day of March, A. D. 1893, manifest error hath intervened, to the great damage of the said plaintiff.

Wherefore said plaintiff prays for the allowance of a writ of error and such other process, and that a transcript of the records and proceedings, evidence, and papers in said action, duly authenticated, may be sent to the United States circuit court of appeals for the seventh circuit, as may cause the same to be corrected by said United States circuit court of appeals for the seventh circuit.

J. H. M. WIGMAN,
U. S. Attorney for Eastern District of Wisconsin.

And now, to wit, on the 6th day of September, 1893, it is ordered that the writ of error be allowed as prayed for.

JAS. G. JENKINS,
Circuit Judge.

17 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writing annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals and correct transcripts therefrom; and that the same is a true copy of the record, exceptions, assignment of errors, and all proceedings in the case of The United States vs. Charles Loughrey et al.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said district, this 30th day of September, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the 118th.

EDWARD KURTZ, *Clerk.*

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between The United States of America, plaintiff, and Charles Loughrey and Miles H. Wheeler, defendants, a manifest error hath happened, to the great damage of the said United States of America as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that

then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the

18 United States circuit court of appeals for the seventh circuit, together with this writ, so that you have the same at Chicago, Illinois, on the 6th day of October next, in the said circuit court of appeals to be then and there held, that, the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this sixth day of September, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the 118th.

EDWARD KURTZ, *Clerk.*

Citation.

UNITED STATES OF AMERICA, ss:

To CHARLES LOUGHREY and MILES H. WHEELER, greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the seventh circuit, to be holden at Chicago, Illinois, on the 6th day of October, A. D. 1893, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein The United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable James G. Jenkins, circuit judge of the United States for the seventh judicial circuit, at the city of Milwaukee, this 6th day of September, A. D. 1893, and of the Independence of the United States the 118th.

JAS. G. JENKINS,
U. S. Circuit Judge.

I accept service of above citation this 3d day of October, A. D. 1893.

W. H. WEBSTER,
Attorney for Defendants in Error.

18½

MAY 31, 1894.

Court met pursuant to adjournment.

Present: Hon. John M. Harlan, circuit justice; Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge.

UNITED STATES OF AMERICA	} 139.
v.	
CHARLES LOUGHREY AND MILES H. WHEELER.	

It is ordered by the court that this cause be and the same is hereby passed.

Order.

It is ordered by the court that Romanzo Bunn, judge of the district court of the United States for the western district of Wisconsin, is designated and assigned to sit in this court as a member thereof during the present session. Thereupon said Bunn appeared and took his seat as a member of said court.

19

MONDAY, *June 4, 1894.*

Court met pursuant to adjournment.

Present: Hon. John M. Harlan, circuit justice; Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. Romanzo Bunn, district judge.

Before Hon. John M. Harlan, circuit justice; Hon. James G. Jenkins, circuit judge; Hon. Romanzo Bunn, district judge.

UNITED STATES OF AMERICA

v.

CHARLES LOUGHREY AND MILES H. WHEELER. }

139.*

It is ordered by the court by the court that the plaintiff in error be and is hereby allowed until Friday next in which to file brief in above-entitled cause.

20

MONDAY, *October 1, 1894.*

At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court rooms, in the city of Chicago, in said seventh circuit, on Monday, the first day of October, 1894, of the said October term, in the year of our Lord one thousand eight hundred and ninety-four and of our Independence one hundred and nineteenth year.

Present: Hon. John M. Harlan, circuit justice; Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge.

UNITED STATES OF AMERICA,

v.

CHARLES LOUGHREY AND MILES H. WHEELER. }

139.

It is ordered by the court that this cause be and the same is hereby continued.

21

MONDAY, *January 7, 1894.*

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge.

It is ordered by the court that John H. Baker, judge of the district court of the United States for the district of Indiana, is designated and assigned to sit in this court as a member thereof during the present session. Thereupon said Baker appeared and took his seat as a member of said court.

UNITED STATES OF AMERICA,
v.
CHARLES LOUGHREY AND MILES H. WHEELER, } 139.

It is ordered by the court that this cause be and the same is hereby set down for hearing January 22, 1895.

22 TUESDAY, January 8, 1895.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John H. Baker, district judge.

UNITED STATES OF AMERICA
v.
CHARLES LOUGHREY AND MILES H. WHEELER. } 139.

It is ordered by the court that Mr. J. H. M. Wigman may be and is hereby substituted for Mr. Thomas E. Milchrist as counsel for the United States of America, plaintiff in error, in above-entitled cause.

THURSDAY, January 24, 1895.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John H. Baker, district judge.

23 UNITED STATES OF AMERICA
v.
CHARLES LAUGHREY AND MILES H. WHEELER. } 139.

It is ordered by the court that this cause be and the same is hereby continued.

MONDAY, May 6, 1895.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

UNITED STATES OF AMERICA
v.
CHARLES LOUGHREY AND MILES H. WHEELER. } 139.

It is ordered by the court that this cause be and the same is hereby passed.

24 MONDAY, October 7, 1895.

At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court rooms, in the city of Chicago, in said seventh circuit on Monday, the seventh day of October, 1895, of the said October term, in the year of our Lord one thousand eight hundred and ninety-five, and of our Independence one hundred and twentieth year.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

UNITED STATES OF AMERICA
v.
CHARLES LOUGHREY AND MILES H. WHEELER. } 139.

It is ordered by the court that this cause be and the same is hereby passed.

25 TUESDAY, *October 8, 1895.*

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

Order.

It is ordered by the court that Romanzo Bunn, judge of the district court of the United States for the western district of Wisconsin, is designated and assigned to sit in this court as a member thereof during the present session. Thereupon said Bunn appeared and took his seat as a member of said court.

WEDNESDAY, *October 16, 1895.*

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

26 UNITED STATES OF AMERICA
v.
CHARLES LOUGHREY AND MILES H. WHEELER. } 139.

It is ordered by the court that this cause be and the same is hereby set down for hearing November 5, 1895.

TUESDAY, *November 5, 1895.*

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. John W. Showalter, circuit judge; Hon. Romanzo Bunn, district judge.

UNITED STATES OF AMERICA
v.
CHARLES LOUGHREY AND MILES H. WHEELER. } 139.

27 Now this day came the parties by their counsel and this cause comes on to be heard on the printed record and briefs of counsel, and the court now being sufficiently advised, takes this matter under consideration.

28 United States circuit court of appeals for the seventh circuit.
No. 139. October term, 1894.

THE UNITED STATES OF AMERICA, }
plaintiff in error, } Error to the circuit court for
vs. } the eastern district of Wis-
CHARLES LOUGHREY AND MILES H. }
Wheeler. } consin.

Before WOODS and SHOWALTER, circuit judges, and BUNN, district judge.

The plaintiff in error sued the defendants in error in trover for timber cut from the north half of the northwest quarter of the northeast quarter of section thirteen, township forty-four north, of range thirty-five west, in the State of Michigan. The complaint charges the cutting of the timber by one Joseph E. Sauve, and that he removed from the lands 80,000 feet of timber so cut and left the balance skidded upon the lands. The defendants are charged as purchasers from Sauve. The amount of timber cut by Sauve is alleged to have been 600,000 feet, and the time of the cutting in the winter of 1887-8 and prior to the first day of March, 1888.

The case was tried by the court without a jury upon facts stipulated as follows:

First. The defendants, prior to the first day of March, 1888, cut and removed from the north half ($\frac{1}{2}$) of the northwest quarter (NW. $\frac{1}{4}$),
29 and the northwest quarter (NW. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$), and the southeast quarter (SE. $\frac{1}{4}$) of the northeast quarter (NE. $\frac{1}{4}$) of section thirteen (13), in township forty-four (44) north, of range thirty-five (35) west, in the State of Michigan, four hundred thousand (400,000) feet of pine timber, and converted the same to their own use.

Second. That such cutting and taking of said timber by the defendants from said land was not a willful trespass.

Third. That none of the lands in question were ever owned or held by any party as a homestead.

Fourth. That the value of said timber shall be fixed as follows: That the value of the same upon the land or stumpage, at \$2.50 per thousand, board measure; that the value of the same when cut and upon the land, \$3.00 per thousand, board measure; that the value of the same when placed in the river was \$5.00 per thousand, board measure; that the value of the same when manufactured was \$7.00 per thousand, board measure.

Fifth. That the lands above described were a part of the grant of lands made to the State of Michigan by an act of the Congress of the United States, approved June 3, 1856, being chapter 44 of Volume II, of the United States Statutes at Large, and that said lands were accepted by the State of Michigan by an act of its legislature, approved February 14th, 1857, being public act No. 126 of the laws of Michigan for that year, and were a part of the lands of said grant within the six-mile limit, so called, outside of the common limits, so called, certified and approved to said State by the Secretary of the Interior, to aid in the construction of the railroad mentioned in said act No. 126 of the laws of Michigan of 1857, to run from Ontonagon to the Wisconsin State line, therein denominated "The Ontonagon and State Line Railroad Company."

Dated October 14th, 1892.

The finding of facts by the court was in accordance with the foregoing stipulation, with the additional finding that said railroad was never built and said grant of lands was never earned by the construction of any railroad.

And as conclusions of law, the court found:

First. That the cause of action sued on in this case did not, at the time of the commencement of this action, and does not now, belong to the United States of America.

Second. That the defendants are entitled to judgment herein for the dismissal of the complaint upon its merits.

No exceptions were taken to the court's findings of fact, and no requests to find were made. Exceptions were only taken to the conclusions of law found by the court and to its failure to find other and contrary conclusions.

30 BUNN, district judge, after stating the case as above, delivered the opinion of the court:

We think the conclusions of law found by the court are fully supported by the adjudged cases. The act of Congress of June 3, 1856, constituted a conveyance in presenti of the lands in question to the State of Michigan. By that act the State of Michigan took the title to the lands, subject, of course, to be defeated by nonperformance of the conditions upon which the grant of lands was made. Until there occurred a breach of these conditions subsequent, the title would remain in the State of Michigan, and a trespass upon the lands would be one for which an action would lie by the State. And even though the conditions upon which the grant was made might never have been complied with, the title would not revert to the Government until some action should be taken by the Government or by Congress declaring the forfeiture and taking back the lands. No such action was taken by Congress in this case until after the acts complained of were committed, and even then it does not appear that the act of Congress included the lands in question. No one had a right to complain of the nonaction by the Government in failing to declare a forfeiture and reinvest itself with the title to the lands, and until it did so the title remained in the State. As the record shows title out of the Government by an act conveying title in presenti from and after June 3, 1856, it was incumbent upon the plaintiff in error to show that it had declared a forfeiture and reinvested itself with the title before the time of the cutting of the timber in the winter of 1888. This it has not done. The only attempt to show a reinvestment of title in the Government is by the act of March 2, 1889, 25 St. at Large, 1008, passed a year after the trespass was committed by Sauve, and that act does not appear by its terms to cover the land in question. That act declared a forfeiture of lands coterminous with the uncompleted portion of the railroad, in aid of which the grant of 1856 was made, and there is nothing in the record to show whether it covered these lands or not. So that there is no evidence that the Government has ever resumed title to the lands from which the timber was cut. But even if the act were broad enough to cover the lands in question, it would still appear that when the cutting and removal of the timber was done, the title was in the State of Michigan and might always remain there. Moreover, there was no attempt on the part of Congress to take back more than the title to the lands, or in any way to invest itself with the right to sue for trespasses committed while the title was out of the Government.

31 A construction was placed upon the act of June 3, 1856, by the Supreme Court in *Lake Superior Ship Canal Company v. Cunningham* (155 U. S., 345), following the cases of *Schulenberg v. Harriman* (21 Wall., 44); *United States v. Southern Pacific Railroad* (146 U. S., 570), and *United States v. Northern Pacific Railroad* (152 U. S., 284).

In the opening of the opinion by Mr. Justice Brewer, on p. 371, the court says :

"The act of June 3, 1856, was a grant in *praesenti*, and when by the filing of the map of definite location the particular tracts were identified, the title to those lands was vested in the State of Michigan, to be disposed of by it in aid of the construction of a railroad between Ontonagon and the Wisconsin State line. The lands were withdrawn from the public domain and no longer open to settlement by individuals for preemption or other purposes. Although there was a provision for the forfeiture of the lands if the roads was not completed within ten years, such provision was a condition subsequent, which could be enforced only by the original grantor, the United States. And until in some appropriate method it asserted its right of forfeiture the title remained in the State of Michigan or the corporations upon which from time to time it conferred the benefit of the grant."

In *Schulenberg v. Harriman* (21 Wall., 44) a similar act passed on the same day granting lands to the State of Wisconsin for similar purposes was under consideration and the same ruling was made. That case, like this, involved a contest over pine logs cut upon the land while held by the State, and it was held that the right of action was in the State or those holding under it. In the opinion of this court the case at bar is properly ruled by that case. In that case it was held to be settled law that no one can take advantage of the nonperformance of a condition subsequent annexed to an estate in fee but the grantor or his heirs, * * * and if they do not see fit to assert the right to enforce forfeiture on that ground the title remains unimpaired in the grantee ; and that the title to the land remaining in the State, the lumber cut upon the land belonged to the State. That whilst the timber was standing, it constituted part of the realty ; being severed from the soil, its character was changed ; it became personalty, but its title was not affected ; it continued as previously the property of the owner of the land and could be pursued wherever it was carried.

The only doubt that could exist in regard to the case being ruled by *Schulenberg v. Harriman* is that in that case, although the conditions of the grant had been broken by a total failure to build the road, still no forfeiture had been declared by Congress. But as we have seen, the act

32 declaring a forfeiture in the case at bar was passed a year after the cutting of the timber, and besides that, the act does not profess to apply to all lands granted by the act of June, 1856, to the State of Michigan, but only to such portions of the land granted as were opposite to and coterminous with the uncompleted portion of any railroad to aid in the construction of which said lands were granted. The forfeiture was not declared until a year after the timber in question was severed from the land and, according to the doctrine of the Supreme Court of the United States, became personal property belonging to the State.

We think, therefore, that the court below was right in holding that the cause of action did not belong to the plaintiff at the time of the commencement of the action, or at the time of the trial.

The judgment of the circuit court is affirmed.

Filed Feb. 8, 1896.

OLIVER T. MORTON, *Clerk*.

33

SATURDAY, February 8, 1896.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. John W. Showalter, circuit judge; Hon. Romanzo Bunn, district judge.

UNITED STATES OF AMERICA,	} 139.
<i>v.</i>	
CHARLES LOUGHREY AND MILES H. WHEELER.	

In error to the circuit court of the United States for the eastern district of Wisconsin.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Wisconsin and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

34

TUESDAY, June 2, 1896.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

Before: Hon. William A. Woods, circuit judge; Hon. John W. Showalter, circuit judge.

UNITED STATES OF AMERICA,	} 139.
<i>v.</i>	
CHARLES LOUGHREY AND MILES H. WHEELER.	

It is ordered by this court that mandate in this cause be, and the same is hereby, withheld until further order of this court.

35 United States circuit court of appeals for the seventh circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 34, inclusive, contain a true copy of the transcript of record and proceedings in the United States circuit court of appeals for the seventh circuit, in the case of United States of America vs. Charles Loughrey and Miles H. Wheeler, No. 139, October term, 1894, as the same remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 6th day of June, A. D. 1896.

[SEAL.]

OLIVER T. MORTON,
*Clerk of the United States Circuit Court of Appeals
 for the Seventh Circuit.*

36 UNITED STATES OF AMERICA, *ss.*:

To CHARLES LOUGHREY and MILES H. WHEELER, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the seventh circuit, wherein The United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 28th day of July, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN M. HARLAN,

Associate Justice of the Supreme Court of the United States.

37 On this 19th day of August, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared Albert J. Cummings before me, the subscriber, a duly qualified and acting cir. ct. commissioner in and for Oconto County, Wisconsin, and makes oath that he delivered a true copy of the within citation to W. H. Webster, the attorney for the defendants, Charles Loughrey and Miles H. Wheeler, on August 19th, 1896, in the city of Oconto, Wis.

ALBERT J. CUMMINGS.

Sworn to and subscribed the 19th day of August, A. D. 1896.

FRANCIS X. MORROW,

Circuit Court Commissioner in and for Oconto Co., Wis.

(Indorsed:) Due service of the within citation on me admitted this 19th day of August, 1896.

38 Afterwards, to wit, on the first day of August, in the term and year last aforesaid, the following further proceedings were had in said cause and entered of record, to wit:

THE UNITED STATES OF AMERICA, PLAINTIFF	}
in error,	
<i>vs.</i>	
CHARLES LOUGHREY AND MILES H. WHEELER.	}

Petition for writ of error.

To the Honorable JOHN M. HARLAN,

Associate Justice of the Supreme Court of the United States:

Come now the petitioners, the United States, by the Solicitor-General, and complaining that they are aggrieved by the judgment of the United States circuit court of appeals for the seventh circuit, rendered in the above-entitled cause, respectfully pray for the allowance of a writ of

error that the same may be reviewed by the Supreme Court of the United States.

(Signed)

HOLMES CONRAD,
Solicitor-General.

39 Allowed July 28th, 1896.

(Signed)

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

40 And on the same day, to wit, the first day of August, in the term and year last aforesaid, came the United States of America, by the Solicitor-General, and filed in the office of the clerk of said court its assignment of errors in the words and figures following, to wit:

In the Supreme Court of the United States, October term, 1896.

THE UNITED STATES OF AMERICA, PLAINTIFF	}
in error,	
<i>vs.</i>	
CHARLES LOUGHREY AND MILES H. WHEELER,	
defendants in error.	

Assignment of errors.

Comes now the Solicitor-General, on behalf of the plaintiff in error, and says that in the record and proceedings in the above-entitled cause in the United States circuit court of appeals for the seventh circuit there is manifest error in this, to wit:

The court erred in its decision by affirming the judgment of
41 the circuit court of the United States in and for the eastern district of Wisconsin.

2d. The court erred in its decision by holding and deciding "that the court below was right in holding that the cause of action did not belong to the plaintiff at the time of the commencement of this action or at the time of the trial."

3d. The court erred in failing to decide that the Ontonagon and State Line Railroad Company had neglected and failed to complete its road within the time limited by law and that the lands described in the complaint remaining unsold reverted to the United States before the commencement of this action.

4th. The court erred in failing to decide that at the time of the cutting and removing of the timber by the defendants the land on which the timber was cut was and formed a part of the public domain.

5th. The court erred in failing to decide that at the time of the cutting and removing of said timber, as well as at the time of the commencement of this action, the plaintiff was the owner of the lands and timber.

42 6th. The court erred in failing to decide that the lands were granted on condition subsequent which was not fulfilled and that the lands had reverted to the United States.

7th. The court erred in failing to decide that title and right of possession to the lands was in the United States.

8th. The court erred in failing to decide that at the time of the commencement of this action, as well as at the time of the trial, the cause of action was in the United States and that it could maintain this action against the defendants to recover the value of the timber which said defendants had wrongfully taken from the lands.

9th. The court erred in failing to order and decree the reversal of the judgment of the circuit court of the United States in and for the eastern district of Wisconsin and to order said court to enter judgment in favor of the United States of America and against said defendants Charles Loughrey and Miles H. Wheeler for the value of said timber, with costs.

(Signed)

HOLMES CONRAD,
Solicitor-General.

43 UNITED STATES OF AMERICA, *vs.*:

The President of the United States, to the honorable the judges of the United States circuit court of appeals for the seventh circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals before you, or some of you, between the United States of America, plaintiff in error, and Charles Loughrey and Miles H. Wheeler, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of July, in the year of our Lord one thousand eight hundred and ninety-six.

[SEAL.]

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

44 A transcript of the record and proceedings of the suit whereof mention is within made, with all things concerning the same, I herewith certify to the justices of the said Supreme Court of the United States within the day and at place within mentioned, as within I am commanded.

OLIVER T. MORTON, [SEAL.]
*Clerk of United States Circuit Court of Appeals
for the Seventh Circuit.*

45 United States circuit court of appeals for the seventh circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 41, inclusive, contain a true copy of the transcript of record and proceedings in the United States circuit court of appeals for the seventh circuit in the case of United States of America vs. Charles Loughrey and Miles H. Wheeler, No. 139, October term, 1894, as the same remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 13th day of August, A. D. 1896.

[SEAL.]

OLIVER T. MORTON,

*Clerk of the United States Circuit Court of Appeals
for the Seventh Circuit.*

(Indorsed on cover:) Case No. 16372. Term No. 224. The United States, plaintiff in error, vs. Charles Loughrey and Miles H. Wheeler. U. S. circuit court of appeals, 7th circuit. Filed August 25, 1896.

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